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In the Supreme Court of the United States

OCTOBER TERM, 1982

CONSOLIDATED RAIL CORPORATION, PETITIONER

v.

LEE ANN LESTRANGE DARRONE, AS ADMINISTRATRIX OF THE ESTATE OF THOMAS LESTRANGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether a private right of action exists under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (Supp. V) 794.

2. Whether Section 504 forbids employment discrimination in federally funded programs and activities only where a primary purpose of the federal funding is to promote employment.

3. Whether the handicapped applicant in this case was denied employment in a "program or activity receiving Federal financial assistance" (29 U.S.C. (Supp. V) 794).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The United States has substantial responsibility for enforcing Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. (Supp. V) 794) in connection with federally assisted programs and activities.[1] The decision in this

[1] In 1976 the President directed the Secretary of Health, Education, and Welfare to "establish standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of section 504." Exec. Order No. 11914, 41 Fed. Reg. 17871 (1976). The Secretary issued detailed regulations. See 45 C.F.R. Part 85 (1978). In 1980, the Secretary's responsibility was transferred to the Attorney General, Exec. Order No. 12250 (45 Fed. Reg. 72995 (1980)), and the regulations were "deemed to have been issued by the Attorney General" (*id.* at 72997; see 28 C.F.R. Part 41). The regulations require each federal agency to issue its own regula-

case will affect the validity of numerous regulations carrying out that federal responsibility. Petitioner asks this Court to hold that Section 504 permits employment discrimination unless a primary purpose of federal financial assistance is to provide employment. Regulations issued by at least 26 federal agencies have interpreted the Act otherwise—as prohibiting employment discrimination in all programs and activities receiving federal funds even if it is not a principal purpose of the funds to provide employment.[2] The United States has taken the same position in this Court[3] and the lower courts.[4] The United States has also participated as amicus curiae in other cases before this Court involving Section 504.[5]

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tions concerning handicap discrimination in the programs and activities financially assisted by that agency. 28 C.F.R. 41.4.

[2] 5 C.F.R. 900.706 (OPM); 7 C.F.R. 15b.11-15b.15 (DOA); 10 C.F.R. 4.122-4.125 (NRC); 10 C.F.R. 1040.66-1040.69 (DOE); 13 C.F.R. 113.3(c) (SBA); 14 C.F.R. 1251.200-1251.203 (NASA); 15 C.F.R. 8b.11-8b.15 (Dept. of Commerce); 18 C.F.R. 1307.5 (TVA); 22 C.F.R. 142.11-142.14 (Dept. of State); 22 C.F.R. 217.11-217.14 (AID); 48 Fed. Reg. 20652-20653 (1983) (to be codified at 24 C.F.R. 8.10-8.13) (HUD); 28 C.F.R. 42.510-42.513 (DOJ); 29 C.F.R. 32.12-32.17 (DOL); 31 C.F.R. 51.55 (Dept. of Treasury); 32 C.F.R. 56.8(b) (DOD); 34 C.F.R. 104.11-104.14 (Dept. of Ed.); 38 C.F.R. 18.411-18.414 (VA); 41 C.F.R. 101-8.305 to 101-8.308 (GSA); 43 C.F.R. 17.210-17.213 (DOI); 45 C.F.R. 84.11-84.14 (HHS); 45 C.F.R. 605.11-605.14 (NSF); 45 C.F.R. 1151.31-1151.34 (NEA); 45 C.F.R. 1170.21-1170.24 (NEH); 45 C.F.R. 1232.9-1232.12 (ACTION); 45 C.F.R. 1624.6 (Legal Services Corp.); 49 C.F.R. 27.31-27.37 (DOT).

[3] *Trageser* v. *Libbie Rehabilitation Center, Inc.*, cert. denied, 442 U.S. 947 (1979).

[4] *United States* v. *Cabrini Medical Center*, 639 F.2d 908 (2d Cir. 1981); *Trageser* v. *Libbie Rehabilitation Center, Inc.*, *supra*, 590 F.2d 87 (4th Cir. 1978); *Scanlon* v. *Atascadero State Hospital*, 677 F.2d 1271 (9th Cir. 1982), petition for cert. pending, No. 82-5812 (filed Nov. 22, 1982).

[5] *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979); *University of Texas* v. *Camenisch*, 451 U.S. 390 (1981). We argued in *Davis* and *Camenisch* that Section 504 affords a private right of action, a proposition which petitioner challenges here.

SUMMARY OF ARGUMENT

I. The courts of appeals unanimously agree that Section 504 of the Rehabilitation Act (29 U.S.C. (Supp. V) 794) may be enforced through a private right of action. Its language is virtually identical to the language of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, which this Court has held created a private right of action. *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979) ("*Cannon*"). The history of Section 504 leads to the same conclusion. Like Title IX, it was based on Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, which was understood by the 1973 Congress to authorize a private cause of action. The year after the Rehabilitation Act was passed, Congress explicitly said that Section 504 would "permit a judicial remedy through a private action." S. Rep. No. 93-1297, 93d Cong., 2d Sess. 40 (1974). The purposes of Section 504 are also congruent with those of Title IX, which *Cannon* held were served by private actions. In fact, in 1978 Congress amended the Rehabilitation Act to authorize attorneys' fees for victorious private suitors. 29 U.S.C. (Supp. V) 794a(b).

II. Section 504 forbids employment discrimination in all federally assisted programs and activities, even if it is not a primary purpose of the federal assistance to promote employment.

A. The language of Section 504 supports this conclusion. It forbids discrimination against the handicapped in "*any* program or activity receiving Federal financial assistance" (emphasis added), not merely those where a primary purpose of the federal assistance is to promote employment. This Court held in *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 529-530 (1982) ("*North Haven*"), that the identical language of Title IX forbids employment discrimination without regard to the purpose for which federal funds were supplied. It would be particularly perverse to read Section 504 more narrowly,

since a basic goal of the entire Rehabilitation Act was to aid in the rehabilitation of the handicapped so that they could be employed and thus participate as useful and productive members in our society.

B. The legislative history of Section 504 shows that Congress intended broad coverage of employment discrimination. Senator Williams, the chairman of the Senate committee that reported the bill stated without qualification that it "prohibit[ed] * * * discrimination in employment in programs assisted with Federal funds * * *." 119 Cong. Rec. 24588 (1973).

C. In 1974 Congress amended the Rehabilitation Act to make clear that employment discrimination was not the *only* form of discrimination forbidden by Section 504. And in 1975 Congress reiterated that "qualified handicapped individuals who * * * are refused employment by recipients of assistance * * * are *fully* covered by the prohibition in section 504 of the Rehabilitation Act of 1973." S. Rep. No. 94-455, 94th Cong., 1st Sess. 54 (1975) (emphasis added).

D. The regulations adopted by the Department of Health, Education, and Welfare to enforce Section 504 forbid employment discrimination in all federally assisted programs and activities, without regard to the purpose of the federal assistance. The courts that interpreted Section 504 between its enactment in 1973 and the 1978 amendments to the Act also drew no distinctions based on the purpose of the federal funding.

E. Section 505(a)(2) (29 U.S.C. (Supp. V) 794a(a)(2)), added to the Rehabilitation Act in 1978, was not intended to restrict Section 504's coverage of employment discrimination. The language of Section 505(a)(2) suggests no such purpose. And Congress explicitly stated that the new section was simply intended to "codif[y]" existing HEW regulations "as a specific statutory requirement." S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978). In general, the 1978 amendments were "designed *to enhance* the ability of handicapped individuals to

assure compliance with the civil rights provisions of" Section 504 (S. Rep. No. 95-890, *supra*, at 18; emphasis added).

III. Because respondent may be entitled to recover back pay, the case is not moot. Congress expressly made back pay available to federal employees who file claims under Section 501 (29 U.S.C. 791). And the Senate committee that had reported the Rehabilitation Act stated in 1979 that the same remedy had always been open to Section 504 plaintiffs. Moreover, this Court suggested in *Guardians Ass'n* v. *Civil Service Comm'n*, No. 81-431 (July 1, 1983), that compensatory relief such as back pay could be available to private plaintiffs invoking Title VI against intentionally discriminatory conduct. That same relief should be available, by virtue of 29 U.S.C. 794a(a)(2), to plaintiffs under Section 504.

IV. The "program or activity" issue advanced by petitioner is not properly before this Court. The district court made no factual findings on the question; it granted summary judgment without reaching the issue. Nor was the issue considered by the court of appeals.

ARGUMENT

I. SECTION 504 MAY BE ENFORCED BY A PRIVATE RIGHT OF ACTION

Petitioner argues (Br. 32-40) that there is no private right of action to enforce Section 504. This contention has been rejected by every court of appeals that has considered the question.[6] It is inconsistent with the language

[6] See *Miener* v. *State of Missouri*, 673 F.2d 969, 973-975 (8th Cir.), cert. denied, No. 82-275 (Oct. 12, 1982); *Pushkin* v. *Regents of the University of Colorado*, 658 F.2d 1372, 1376-1380 (10th Cir. 1981); *Kling* v. *County of Los Angeles*, 633 F.2d 876, 878 (9th Cir. 1980); *Camenisch* v. *University of Texas*, 616 F.2d 127, 131 (5th Cir. 1980), vacated on other grounds, 451 U.S. 390 (1981); *NAACP* v. *Medical Center*, 599 F.2d 1247, 1258-1259 (3d Cir. 1979); *Davis* v. *Southeastern Community College*, 574 F.2d 1158, 1159 (4th Cir. 1978), rev'd on other grounds, 442 U.S. 397 (1979);

and history of the Rehabilitation Act. It also cannot be squared with this Court's decision in *Cannon*, *supra*, which held that a virtually identical provision in Title IX of the Education Amendments of 1972 (20 U.S.C. 1681(a)) created a private right of action.

In determining whether Congress intended to create a private right of action, "the threshold question * * * is answered by looking to the language of the statute itself." *Cannon*, *supra*, 441 U.S. at 689. Section 504 provides that (29 U.S.C. (Supp. V) 794)

> No otherwise qualified handicapped individual in the United States * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * *.

In *Cannon* this Court held that Congress's use of indistinguishable language a year earlier in Title IX was intended to create a private right of action.[7] The Court pointed out that, with the exception of one "virtually unique situation," "this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case." *Cannon*, *supra*,

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Kampmeier v. *Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977); *Lloyd* v. *Regional Transportation Authority*, 548 F.2d 1277, 1284-1287 (7th Cir. 1977).

[7] Section 901(a) states (20 U.S.C. 1681(a)):

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *.

Both Section 504 and Section 901 are modeled after Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d. See *Community Television of Southern California* v. *Gottfried*, No. 81-298 (Feb. 22, 1983), slip op. 11; *North Haven Board of Education* v. *Bell*, *supra*, 456 U.S. at 529.

441 U.S. at 690-691 n.13. The language of Section 504 confers a right on respondent[8] in precisely the same terms as Section 901 conferred a right on Cannon.[9]

The history of Section 504 also "rather plainly indicates that Congress intended to create such a remedy." *Cannon*, *supra*, 441 U.S. at 694. In *Cannon* this Court concluded that "Congress intended to create Title IX remedies comparable to those available under Title VI [42 U.S.C. 2000d] and * * * it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination" (441 U.S. at 703). Section 504 was enacted the year after Title IX, and was

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[8] Petitioner concedes that any private right of action under Section 504 survives Thomas LeStrange's death (Br. 31 n.23).

[9] Petitioner states at several points (Br. 4, 15, 36) that the failure to provide explicit remedies in the original Rehabilitation Act shows that Congress intended in Section 504 only to make a statement of policy, not to create enforceable rights. This contention ignores the language of Section 504, which, like Titles VI and IX, speaks in mandatory rather than hortatory terms: "No * * * individual * * * shall * * * be excluded * * *, be denied * * * *, or be subjected to discrimination * * *." Such "right- or duty-creating language" has been found to be "the most accurate indicator of the propriety of implication of a cause of action." *Cannon*, *supra*, 441 U.S. at 690 n.13. Section 504's language is markedly dissimilar to that found in congressional statements of policy. Cf. *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 19 (1981) (Congress made "findings" concerning rights).

Petitioner also emphasizes statements in several committee reports that " 'proclaim a policy of nondiscrimination' " (Br. 15, quoting S. Rep. No. 92-1135, 92d Cong., 2d Sess. 49 (1972)). But those same reports state that Section 504 "prohibits discrimination" and imposes a "requirement of * * * nondiscrimination * * *." *Id.* at 6, 9, 77; S. Rep. No. 93-318, 93d Cong., 1st Sess. 70 (1973). See also S. Rep. No. 93-48, 93d Cong., 1st Sess. 53, 80 (1973). It is highly unlikely that Congress would have borrowed the language of Title VI, which the courts had already ruled created a private right of action (see cases cited in *Cannon*, *supra*, 441 U.S. at 696-697 n.21), if it had meant to confine itself to a declaration of policy.

also patterned after Title VI.[10] When the Rehabilitation Act was amended in 1974, the Senate report noted that the

> approach to implementation of section 504, which closely follows the models of [Title VI and Title IX], would * * * permit a judicial remedy through a private action.

S. Rep. No. 93-1297, *supra*, at 40.[11] See also S. Rep. No. 96-316, 96th Cong., 1st Sess. 12-13 (1979).

The Court stated in *Cannon* that when a private right of action "is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute" (441 U.S. at 703). Like Title IX and Title VI, Section 504 has two related purposes: prohibiting the use of federal funds to support discrimination, and providing individual citizens effective protection against discrimination. The first purpose is served by terminating federal financial aid (see *Community Television of Southern California* v. *Gottfried*, No. 81-298 (Feb. 22, 1983), slip op. 10-11 (*"Gottfried"*)). But that remedy is a severe and inappropriate cure for isolated violations. "The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with—and in some cases even necessary to— the orderly enforcement of the statute" (*Cannon*, *supra*, 441 U.S. at 705-706). The Department of Justice, charged with the responsibility for coordinating the enforcement of Section 504 (see note 1, *supra*), "perceives no incon-

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[10] See note 7, *supra*. In fact, the provision that ultimately became Section 504 was written in 1972, by the same Congress that enacted Title IX. See pages 13-15, *infra*.

[11] Petitioner suggests (Br. 36-37) that the reference to "a judicial remedy through a private action" in the 1974 Senate report concerns "the right to judicial review of an agency's decision to terminate or continue the federal funding of a program or activity * * *." If so, the mention of a private right of action is redundant; the same sentence in the report also states that there is a "right to review" of administrative decisions. S. Rep. No. 92-1297, *supra*, at 40.

sistency between the private remedy and the public remedy" (*Cannon, supra*, 441 U.S. at 706). And the "history of federal-court recognition of a cause of action" (see note 6, *supra*) is a "further indication of the consistency of [Section 504's] purposes and the existence of a private remedy" (*Cannon, supra*, 441 U.S. at 706 n.40).[12]

The 1978 amendments to the Rehabilitation Act, which according to petitioner (Br. 34-38) exclude private enforcement,[13] in fact afford persuasive evidence of Congress's belief that a private remedy is essential to accomplish the statutory purposes. Section 505(b) (29 U.S.C. (Supp. V) 794a(b)) states that

> In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing

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[12] Petitioner argues (Br. 39-40) that the existence of a private right of action would interfere, in some unspecified way, with administrative enforcement of Section 504. But petitioner overlooks the fact that this Court "has *never* withheld a private remedy where the statute explicitly confers a benefit on a class of persons and where it does not assure those persons the ability to activate and participate in the administrative process contemplated by the statute" (*Cannon, supra*, 441 U.S. at 707 n.41; emphasis added). Like the procedures under Title IX (see 441 U.S. at 707 n.41), the administrative enforcement mechanism under Section 504 provides no role for the complainant in the investigation and subsequent proceedings, and offers no assurance of relief for the complainant even if a violation is found. See *Pushkin* v. *Regents of the University of Colorado, supra*, 658 F.2d at 1381-1382; *Camenisch* v. *University of Texas, supra*, 616 F.2d at 132, 135.

[13] Petitioner argues (Br. 34-35) that Section 505(a)(2) (29 U.S.C. (Supp. V) 794a(a)(2)) was intended to limit "whatever implied enforcement rights previously existed" (Br. 37). That Section states that "[t]he remedies, procedures, and rights set forth in title VI * * * shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance * * *." Petitioner claims that because no private right of action is explicitly "set forth" in Title VI, the remedies now open to Section 504 plaintiffs are actually less generous than those available to Title VI victims. There is no hint in the 1978 legislative history that Section 505(a)(2) was enacted with such a retrograde purpose.

party, other than the United States, a reasonable attorney's fee as part of the costs.

The history of this provision states unequivocally that it was intended to apply to private plaintiffs. See, *e.g.*, S. Rep. No. 95-890, *supra*, at 19; H.R. Rep. No. 95-1149, 95th Cong., 2d Sess. 21 (1978); 124 Cong. Rec. 30346-30347 (1978) (remarks of Sen. Cranston). Cf. *Cannon*, *supra*, 441 U.S. at 685-686, 699-701 (similar attorneys' fees provisions show private enforceability of Titles VI and IX).[14]

II. SECTION 504 FORBIDS EMPLOYMENT DISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS AND ACTIVITIES EVEN IF IT IS NOT A PRIMARY PURPOSE OF THE FEDERAL ASSISTANCE TO PROMOTE EMPLOYMENT

The language of Section 504 prohibits discrimination in "*any* program or activity receiving Federal financial assistance" (emphasis added). Nothing in the history of the Rehabilitation Act of 1973 provides a basis for believing that this comprehensive wording was implicitly confined—in the case of employment—to programs and ac-

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[14] The fourth factor mentioned in *Cannon*—this Court's hesitance to imply a federal remedy in areas basically of concern to the states—presents no more difficulty here than it did there, since it is again "the expenditure of federal funds that provides the justification for this particular statutory prohibition" (441 U.S. at 708-709).

This Court's recent decision in *Guardians Ass'n* v. *Civil Service Comm'n*, No. 81-431 (July 1, 1983), does nothing to undermine the conclusion that a private right of action is available to enforce Section 504. A majority of the Court there concluded "that Title VI * * * could be enforced in a private action against a state or local agency receiving federal funds" (slip op. 12 (opinion of White, J.), slip op. 10-13 (opinion of Marshall, J.), slip op. 1-2 (opinion of Stevens, J.)). It is true, however, that in this case, unlike in *Guardians* (see slip op. 12 (opinion of White, J.)), there is no viable claim under 42 U.S.C. 1983 to provide an alternative basis for such a private action. The district court dismissed LeStrange's Section 1983 claim (Pet. App. A54-A57), and LeStrange did not appeal the dismissal.

tivities receiving federal funds for the purpose of promoting employment. Indeed, when the Rehabilitation Act was amended in 1974, Congress found it important to emphasize that protection against employment discrimination was not the *only* purpose of Section 504. Contemporary administrative and judicial construction mirrored Congress's understanding that Section 504 affords broad protection against employment discrimination.

Petitioner nonetheless contends (Br. 4-24) that in Section 505(a)(2) (29 U.S.C. (Supp. V) 794a(a)(2))—added to the Rehabilitation Act five years after its passage—Congress authorized employment discrimination by federally funded programs unless the primary purpose of federal funding was to promote employment. The language of Section 505(a)(2) does not support that construction. Nor did Congress even suggest, when it passed the 1978 amendments, that it intended to truncate so severely the rights that the 1973 Act had conferred on handicapped employees.[15]

A. The Language Of Section 504 Covers Employment Discrimination Comprehensively In All Federally Assisted Programs And Activities

Before we address the effect of the 1978 amendments, on which petitioner relies so heavily, it is important to

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[15] The courts of appeals are split on this issue. The court of appeals here and the Eleventh Circuit (*Jones* v. *MARTA*, 681 F.2d 1376 (11th Cir. 1982), petition for cert. pending, No. 82-1159 (filed Jan. 11, 1983)), have held that Section 504 prohibits employment discrimination regardless of the purpose of the federal assistance. The Second, Fourth, Eighth and Ninth Circuits have adopted the narrower view espoused by petitioner. *United States* v. *Cabrini Medical Center*, 639 F.2d 908 (2d Cir. 1981); *Trageser* v. *Libbie Rehabilitation Center*, 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979); *Carmi* v. *Metropolitan St. Louis Sewer District*, 620 F.2d 672 (8th Cir.), cert. denied, 449 U.S. 892 (1980); *Scanlon* v. *Atascadero State Hospital*, 677 F.2d 1271 (9th Cir. 1982), petition for cert. pending, No. 82-5812 (filed Nov. 22, 1982); *Meyerson* v. *Arizona*, No. 81-5996 (9th Cir. May 9, 1983). See also *Ward* v. *MBTA*, 550 F. Supp. 1310 (1982), appeal pending, No. 82-1918 (1st Cir.).

examine the coverage of the Rehabilitation Act during the first five years of its existence. Petitioner does not dispute that the language of Section 504 applies to handicapped employees. That concession is not surprising, given the identity among Section 504, Section 901(a) of Title IX (20 U.S.C. 1681(a)), and Section 601 of Title VI (42 U.S.C. 2000d). See note 7, *supra*. Just as "Section 901(a)'s broad directive that 'no person' may be discriminated against on the basis of gender appears, on its face, to include employees as well as students" (*North Haven*, *supra*, 456 U.S. at 520), so Section 504's identical command that no individual may be discriminated against by reason of his handicap includes employees as well as other handicapped persons.

But petitioner argues that Section 504 covers employment in only *some* federally assisted programs and activities—those where a primary purpose of federal aid is to promote employment. That contention is difficult to square with the express terms of the 1973 Act. It is clear from the face of Section 504 that if employment discrimination is prohibited, it is comprehensively prohibited in "*any* program or activity receiving Federal financial assistance * * *."

In fact, just as the existence of a private right of action was controlled by *Cannon*, so this question—the scope of the federal prohibition against employment discrimination—is controlled by *North Haven*, another Title IX case. Petitioners in *North Haven* argued (as petitioner does here) that Title IX was based on Title VI, and that Title VI—as Section 604 makes clear—does not cover employment discrimination "except where a primary objective of the Federal financial assistance is to provide employment" (42 U.S. 2000d-3).[16] This Court answered (456 U.S. at 529-530):

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[16] Section 604 (42 U.S.C. 2000d-3) provides in full:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any em-

> The meaning and applicability of Title VI are useful guides in construing Title IX * * * only to the extent that the language and history of Title IX do not suggest a contrary interpretation. * * * If Congress had intended that Title IX have the same reach as Title VI, * * * it would have enacted counterparts to both § 601 and § 604. For although two statutes may be similar in language and objective, we must not fail to give effect to the differences between them.

Like Title IX, the Rehabilitation Act of 1973 included no counterpart to Section 604. Yet "[i]f Congress had intended that [Section 504] have the same reach as Title VI" it would not have stopped where it did; for Section 504 "alone [is] not * * * adequate to exclude employees from the statute's coverage" in the way petitioner suggests. *North Haven, supra*, 456 U.S. at 530.[17]

The structure and focus of the Rehabilitation Act as a whole support the conclusion that Section 504 was meant to forbid employment discrimination in "any program or activity." The Act was designed to "promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment" (29 U.S.C. 701(8)). The very term "handicapped" is defined in the 1973 Act in terms of an individual's employability.[18] Title I of the

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ployer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

[17] Petitioner correctly points out (Br. 7-8) that in passing Title IX Congress expressly rejected a provision similar to Section 604; no similar provision was even proposed for inclusion in the Rehabilitation Act of 1973. But it is hardly surprising that Congress —having rejected Section 604 in 1972—was unwilling to go through the motions again in 1973.

[18] Section 7(6) of the Rehabilitation Act (29 U.S.C. (Supp. III 1970 ed.) 706(6)) defined "handicapped individual" as "any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to em-

Act authorized grants to aid the handicapped "so that such individuals may prepare for and engage in gainful employment" (29 U.S.C. 720(a)). And Title V not only forbids discrimination by recipients of federal funds (Section 504), but also directs federal agencies and federal contractors to undertake affirmative action to hire and promote the handicapped (Sections 501, 503, 29 U.S.C. 791, 793).

It would be remarkable if, in an act whose very focus was on promoting employment opportunities for handicapped individuals, Congress had limited its ban on employment discrimination in the narrow fashion suggested by petitioner. It is far more faithful to the intent of Congress, "'if we are to give [Section 504] the scope that its origins dictate, [to] accord it a sweep as broad as its language.'" *North Haven, supra*, 456 U.S. at 521, quoting *United States* v. *Price*, 383 U.S. 787, 801 (1966).

B. The Legislative History Of The Rehabilitation Act Of 1973 Shows Congress's Intent To Cover Employment Discrimination In All Federally Assisted Programs And Activities

Section 504 originated in the 92d Congress, when numerous proposals were made to amend Titles VI and VII of the Civil Rights Act of 1964 (42 U.S.C. (& Supp. V) 2000d, 2000e) by including the handicapped among the protected classes.[19] Had those measures been enacted,

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ployment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to titles I and III of this Act."

[19] Bills introduced in the 92d Congress to amend Title VI included: H.R. 12154, 92d Cong., 1st Sess. (1971) (Rep. Vanik); H.R. 12737, 92d Cong., 2d Sess. (1972) (Rep. Abzug); H.R. 13009, 92d Cong., 2d Sess. (1972) (Rep. Vanik et al.); H.R. 13297, 92d Cong., 2d Sess. (1972) (Rep. Roybal); H.R. 13306, 92d Cong., 2d Sess. (1972) (Rep. Vanik et al.); H.R. 13947, 92d Cong., 2d Sess. (1972) (Rep. Vanik et al.); H.R. 14117, 92d Cong., 2d Sess. (1972) (Rep. Halpern); H.R. 14517, 92d Cong., 2d Sess. (1972) (Rep. Dow); H.R. 15012, 92d Cong., 2d Sess. (1972) (Rep. Steele);

they would have forbidden employment discrimination by all employers of 15 or more, without regard to the receipt (or purpose) of federal financial assistance. See 42 U.S.C. 2000e(b), 2000e-2(a)(1); H.R. 14033, 92d Cong., 2d Sess. § 1 (1972). Congress decided, however, not to extend Title VII to the handicapped. Instead Congress chose to include in the Rehabilitation Act the language of Title VI's prohibition against discrimination (Section 601)—but not Title VI's employment limitation (Section 604). S. 3987, 92d Cong., 2d Sess. § 604 (1972) (the original version of Section 504). Several of the sponsors of the earlier measures expressed their approval of the alternative chosen. Senator Humphrey, for example, stated (118 Cong. Rec. 32310 (1972)):

> I am deeply gratified at the inclusion of [Section 504 and other] provisions, which carry through the intent of original bills which I introduced * * * earlier this year, S. 3044 and S. 3458, to amend, respectively, Titles VI and VII of the Civil Rights Act of 1964, to guarantee the right of persons with a mental or physical handicap to participate in programs receiving Federal assistance, and to make discrimination in employment because of these handicaps, and in the absence of a bona fide occupational qualification, an unlawful employment practice.

H.R. 15371, 92d Cong., 2d Sess. (1972) (Rep. Harrington); S. 3044, 92d Cong., 2d Sess. (1972) (Sen. Humphrey et al.).

Bills introduced in the 92d Congress to amend Title VII included: H.R. 10962, 92d Cong., 1st Sess. (1971) (Rep. Hicks); H.R. 10996, 92d Cong., 1st Sess. (1971) (Rep. Hicks); H.R. 14033, 92d Cong., 2d Sess. (1972) (Rep. Vanik); H.R. 15678, 92d Cong., 2d Sess. (1972) (Rep. Ashley); S. 3458, 92d Cong., 2d Sess. (1972) (Sen. Humphrey et al.).

Similar legislation to include the handicapped within the protection of Title VII was introduced in the 93d Congress. See, *e.g.*, H.R. 2685, 93d Cong., 1st Sess. (1973) (Rep. Hicks); H.R. 10960, 93d Cong., 1st Sess. (1973) (Rep. Tiernan); H.R. 11986, 93d Cong., 1st Sess. (1973) (Rep. Hicks et al.); H.R. 11987, 93d Cong., 1st Sess. (1973) (Rep. Hicks et al.); S. 1780, 93d Cong., 1st Sess. (1973) (Sen. Pell).

In the same vein Congressman Vanik, who had introduced similar bills (see note 19, *supra*), later stated (119 Cong. Rec. 18137 (1973)):

> [I]t pleases me that the adoption of my proposals to protect the rights of handicapped people in employment, and in the issuance of Federal grants, have been incorporated into this compromise bill.

When S. 3987, *supra*, was introduced, Senator Randolph stated that it would "prohibit[] *any kind* of discrimination against handicapped individuals with respect to *any* program receiving Federal financial assistance." 118 Cong. Rec. 30681 (1972) (emphasis added). The proposal proved uncontroversial. What discussion there was did not go beyond summaries of its language. See, *e.g.*, 118 Cong. Rec. 30683 (1972) (remarks of Sen. Cranston). Though the measure passed by the House did not include a provision similar to Section 504, the House receded in conference without comment. H.R. Rep. No. 92-1581, 92d Cong., 2d Sess. 78 (1972). President Nixon pocket vetoed the bill because it would have authorized funding in excess of budget, and would have created "numerous committees and independent commissions which are unnecessary * * *." 118 Cong. Rec. 37203-37204 (1972).

Similar measures were promptly reintroduced in both houses. S. 7, 93d Cong., 1st Sess. (1973); H.R. 17, 93d Cong., 1st Sess. (1973). In the course of the debate on S. 7 Senator Cranston—who chaired the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare while the bill was being considered—said in the course of defending the various commissions called for by the bill (119 Cong. Rec. 5882 (1973)):

> Such problems as unfounded discrimination in employment and * * * difficulties of access to places of work * * * were voiced repeatedly to the committee. * * * [D]iscrimination in placement, hiring and advancement continue[s] to limit the vocational rehabilitation program's ability to effect successful rehabilitations.
>
> * * * * *

> The expenditure of money on vocational rehabilitation programs is not well spent if we do not at the same time take meaningful steps to * * * provide substantial accomplishments in employment for handicapped individuals.

Senator Javits, a co-sponsor of the Act and a member of the subcommittee, described the bill generally as "provid[ing] new emphasis on * * * opportunities for employment of the handicapped" (*id.* at 5887). President Nixon again vetoed the measure (*id.* at 9597).

Again similar bills were introduced in both houses. H.R. 8070, 93d Cong., 1st Sess. (1973); S. 1875, 93d Cong., 1st Sess. (1973). The Senate Report on S. 1875, S. Rep. No. 93-318, 93d Cong., 1st Sess. 4 (1973), stated that hearings on the legislation had shown a "lack of action in areas related to rehabilitation which limit a handicapped individual's ability to function in society, e.g., employment discrimination * * *." The same theme was stressed by Senator Taft during floor debate on the bill (119 Cong. Rec. 24587 (1973)):

> Too many handicapped Americans * * * lack jobs, and too many are underemployed * * *.
>
> [I]f we are to assure that all handicapped persons may participate fully in the rewards made possible by the vocational rehabilitation program, we must devote more of our energy toward the elimination of the most disgraceful barrier of all—discrimination.

Perhaps the most direct observation on the intended scope of Section 504 was offered by Senator Williams, the chairman of the Committee on Labor and Public Welfare. He stressed that the modified bill, unlike the two that had been vetoed, had the support of the administration. The bill nonetheless retained features from the earlier measures that the Committee, in the course of its hearings, had found necessary (119 Cong. Rec. 24587-24588 (1973); emphasis added):

> The committee also found it necessary to * * * grapple with problems, which while not related solely

> to rehabilitation, pose serious problems for handicapped individuals in becoming employed [and] staying employed * * *. In this respect the committee paid special attention to the problems of employment, discrimination, [and so on.]
>
> Mr. President, S. 1875 retains many of the provisions contained in the previous legislation. These include:
>
> * * * * *
>
> Second, * * * *prohibitions against discrimination in employment in programs assisted with Federal funds* * * *.

It is true that Congress's discussion of Section 504 does not explicitly reject the notion that employment discrimination is forbidden only where a primary purpose of the federal assistance is to promote employment. But it would be surprising if that issue had arisen, since the language of the section suggests no such restriction. More important, the bill contained no counterpart to Section 604 of Title VI, and no hint that any parallel restriction was contemplated. What the legislative history does show, on the other hand, is an unqualified concern that employment discrimination could cancel out whatever advances the Act made in rehabilitation of the handicapped, and a corresponding purpose to "prohibit[] * * * discrimination in employment in programs assisted with Federal funds" (119 Cong. Rec. 24588 (1973)).

C. The Legislative History Of The 1974 Amendments Reinforces The View That Section 504 Was Originally Intended To Cover Employment Discrimination In All Federally Assisted Programs And Activities

"Although postenactment developments cannot be accorded 'the weight of contemporary legislative history' " (*North Haven*, *supra*, 456 U.S. at 535, quoting *Cannon*, *supra*, 441 U.S. at 687 n.7), certain "subsequent events * * * lend credence to the * * * interpretation" given Section 504 by the agencies charged with implementing it (*ibid.*). See note 2, *supra*. In 1974 the Rehabilitation

Act was amended by the same Congress that had enacted it a year earlier.[20] Section 504 itself was not altered. But the definition of "handicapped" was changed to make clear that employment discrimination was not the *only* form of discrimination covered by Section 504.[21] The Senate committee report[22] explained (S. Rep. No. 93-1297, *supra*, at 37 (emphasis added)):

> Section 7(6) of the Rehabilitation Act of 1973 defines "handicapped individual." That definition has proven to be troublesome in its application to provisions of the Act such as *sections 503 and 504 because of its orientation toward employment* and its relation to vocational rehabilitation services. It was clearly the intent of Congress in adopting section 503 (affirmative action) and section 504 (nondiscrimination) that the term "handicapped individual" in those sections was *not to be narrowly limited to employment (in the case of section 504)* * * *.

Thus, far from suggesting that Section 504's employment coverage was limited, Congress in 1974 found it neces-

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[20] Pub. L. No. 93-516, 88 Stat. 1617. The 1974 amendments expanded the focus on employment of the handicapped. In addition to increasing the authorization for the original rehabilitation program, the amendments strengthened the federal blind vendor program (Title II, 88 Stat. 1622), and established the White House Conference on Handicapped Individuals (Title III, 88 Stat. 1631) to consider, among other things, recommendations "assuring individuals with handicaps of equal opportunity with others to engage in gainful employment" (88 Stat. 1632).

[21] The original definition of "handicapped individual" (see note 18, *supra*) was amended to read: "For the purposes of subchapters IV and V of this Act, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment." 29 U.S.C. 706(6).

[22] This Court relied on S. Rep. No. 93-1297 in *Gottfried*, *supra*, slip op. 11, as evidence of Congress's original understanding of Section 504. See also *Glidden Company* v. *Zdanok*, 370 U.S. 530, 541-542 (1962) (plurality opinion); *FHA* v. *The Darlington, Inc.*, 358 U.S. 84, 90 (1958).

sary to dispel the impression that it had nothing else on its mind.[23]

The Senate report went on to say (S. Rep. No. 93-1297, *supra*, at 39):

> Section 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964 * * *, and section 901 of the Education Amendments of 1972 * * *. The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap.

There is no reference here to Section 604, and no suggestion of any limitation on the "broad government policy" against discrimination.[24]

D. Administrative Regulations And Judicial Opinions Construed Section 504 To Prohibit Employment Discrimination Regardless Of The Purpose Of The Federal Assistance

In passing the 1974 amendments to the Rehabilitation Act, Congress expressed its desire that an administrative program to enforce the Act—like those adopted for Titles VI and IX—be created by regulation. S. Rep. No. 93-

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[23] See also S. Rep. No. 93-1297, *supra*, at 63-64 (the new definition would provide sufficient latitude "for the nondiscrimination programs carried out under sections 501, 503, and 504 with respect to the employment of handicapped individuals in the Federal Government, under Federal contracts and subcontracts, pursuant to the provision of Federal financial assistance, and in the State rehabilitation agencies and local facilities, and the participation of handicapped individuals in any program or activity receiving Federal financial assistance").

[24] See also S. Rep. No. 94-455, *supra*, at 54 ("It is clear that qualified handicapped individuals who, because of their handicap, are refused employment by recipients of assistance under the [Education for All Handicapped Children] Act are fully covered by the prohibition in section 504 of the Rehabilitation Act of 1973."); 122 Cong. Rec. 3257 (1976) (remarks of Rep. Dodd).

1297, *supra*, at 39-40. See also 120 Cong. Rec. 15743 (1974) (remarks of Rep. Vanik). The President designated the Department of Health, Education, and Welfare ("HEW") as the agency responsible for coordinating Section 504 enforcement. Exec. Order No. 11914, *supra* note 1. HEW therefore proposed (41 Fed. Reg. 29548 (1976)) and thereafter promulgated (42 Fed. Reg. 22676 (1977)) departmental regulations to govern its own recipients' activities. HEW noted that Section 504 differed "from Title VI in the extent to which it applies to employment practices" (41 Fed. Reg. 29548). The departmental regulations interpreted Section 504 to prohibit all employment discrimination regardless of the purpose of federal financial assistance. (42 Fed. Reg. 22680, 22688.) HEW later promulgated its coordinating regulations pursuant to Exec. Order No. 11914; these also interpreted Section 504 to forbid employment discrimination in all federally assisted programs and activities, without regard to the purpose of the federal assistance. 43 Fed. Reg. 2132, 2138 (1978).[25]

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[25] Other federal agencies providing financial assistance thereafter issued their own regulations patterned on the HEW coordinating regulations. See note 2, *supra*. Among them is the Department of Transportation, from whom petitioner receives financial assistance (Pet. Br. 22 n.18). HEW's coordinating and enforcement authority for Section 504 was transferred to the Department of Justice in 1980. See note 1, *supra*. HEW's regulations remain in effect pending the adoption of new regulations by the Department of Justice. 46 Fed. Reg. 40686-40687 (1981).

Petitioner contends (Br. 22)—relying on this Court's decision in *Southeastern Community College* v. *Davis*, *supra*, 442 U.S. at 411 n.11—that HEW's regulations are entitled to little weight because they were not promulgated until three years after passage of the Rehabilitation Act. *Davis* held that HEW's regulations, if they in fact imposed the kind of affirmative action requirement urged by Davis (a matter about which this Court expressed some doubt, 442 U.S. at 409-410), misunderstood Congress's intent in that regard (*id.* at 411-412). That is a far cry from holding that the regulations depart from Congress's intent respecting the basic issue of coverage at stake here. Nor is it proper to conclude that the regulations are entitled to little deference in general. This

The early judicial decisions interpreting Section 504 also entertained claims asserting employment discrimination without inquiring into the purpose of federal financial assistance.[26]

It is against this background of statutory language and structure, legislative history, administrative regulation, and judicial interpretation, that Section 505(a)(2) was enacted in 1978.

E. Section 505(a)(2) Was Not Designed to Narrow Section 504's Prohibition Against Employment Discrimination

When the Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments were passed in 1978, Pub. L. No. 95-602, 92 Stat. 2955, it was well established that Section 504 protected the handicapped against employment discrimination whenever there existed federal financial assistance, without regard to its purpose. Neither the language of Section 505(a)(2) (29 U.S.C. (Supp. V) 794a(a)(2)) nor its history suggests that Congress intended in 1978 radically to reverse this policy against employment discrimination.

Petitioner's arguments (Br. 5-10) transform Section 505(a)(2) into a remarkable Trojan horse. According to petitioner, that Section introduces into the Rehabilitation Act all of Title VI, including Section 604 (42 U.S.C. 2000d-3), which forbids federal agencies to cut off funding or otherwise redress racial discrimination "except

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Court relied on them to support its interpretation of the term "otherwise qualified" in *Davis*, 442 U.S. at 406, and acknowledged in *Gottfried* (slip op. 11 & n.15) that HEW had responsibility for coordination and enforcement of Section 504.

[26] See *Gurmankin* v. *Costanzo*, 411 F.Supp. 982, 989 (E.D. Pa. 1976), aff'd on other grounds, 556 F.2d 184 (3d Cir. 1977); *Whitaker* v. *Board of Higher Education*, 461 F.Supp. 99, 106-109 (E.D.N.Y. 1978); *Davis* v. *Bucher*, 451 F.Supp. 791 (E.D. Pa. 1978); *Duran* v. *City of Tampa*, 430 F.Supp. 75 (M.D. Fla. 1977), 451 F.Supp. 954 (M.D. Fla. 1978); *Drennon* v. *Philadelphia General Hospital*, 428 F.Supp. 809 (E.D. Pa. 1977).

where a primary objective of the Federal financial assistance is to provide employment."

Such a conclusion is certainly not compelled by the language of Section 505(a)(2), which says:

> The remedies, procedures, and rights set forth in title VI * * * shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance * * *.

Unlike Section 601 (42 U.S.C. 2000d) (which Congress understood to create a private "right" of action), Section 602 (42 U.S.C. 2000d-1) (which directs the creation of remedies and procedures to enforce Title VI rights), and Section 603 (42 U.S.C. 2000d-2) (which authorizes judicial review of funds cutoffs), Section 604 "set[s] forth" no "remedies, procedures, [or] rights." It is a substantive limitation on the scope of Title VI,[27] limiting the protection it affords to employees. Nor does Section 604 make anything at all "available" to anyone; it would therefore seem peculiar to speak of making its limitation "available" to persons aggrieved under the Rehabilitation Act. Section 505(a)(2) is plainly designed to make "available" to the handicapped options that may be selected, not to create an absolute limitation on the reach of the statute. Finally, Section 505(a)(2) says

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[27] It has been suggested that Section 604, which is addressed to action by "any department or agency" (42 U.S.C. 2000d-3), does not limit the right of private plaintiffs to seek relief for employment discrimination. See Comment, *Employment Discrimination Against the Handicapped: Can* Trageser[] *Repeal the Private Right of Action?*, 54 N.Y.U. L. Rev. 1173, 1185-1191 (1979). But see *Feliciano* v. *Romney*, 363 F.Supp. 656 (S.D.N.Y. 1973); *Otero* v. *Mesa County Valley School Dist. No. 51*, 470 F.Supp. 326 (D. Colo. 1979), aff'd, 628 F.2d 1271 (10th Cir. 1980). If so, it would not limit respondent's right to proceed in this case even if it were incorporated in the Rehabilitation Act by Section 505(a)(2). While we have serious doubt that such an interpretation is consistent with the purpose of Section 604, the Court need not reach that issue in this case, because it is sufficiently clear that Congress did not intend to make Section 604 applicable to the Rehabilitation Act.

that Title VI's remedies, rights, and procedures are open to "*any* person aggrieved by *any* act • • • by *any* recipient of Federal assistance"—terms hardly consistent with employment coverage that applies only to *some* recipients.

The legislative history of the 1978 amendments shows that Congress's purpose was to incorporate Title VI's enforcement procedures, not to restrict Section 504's substantive coverage. In 1974 Congress noted that Section 504 was patterned after Titles VI and IX, and was intended to be enforced through regulations and procedures like the ones adopted under those titles. S. Rep. No. 93-1297, *supra*, at 39-40. As examples of what it meant, Congress cited (*id.* at 40) "a judicial remedy through a private action" (cf. Section 601, 42 U.S.C. 2000d); agency regulations providing for investigation and review of funds recipients and for enforcement through voluntary means (or, where necessary, funds cutoff) (cf. Section 602, 42 U.S.C. 2000d-1); and administrative due process, including a "right to review" (cf. Section 603, 42 U.S.C. 2000d-2). HEW thereafter proposed its departmental and coordinating regulations, which it "la[id] • • • before the Congress so that it [could] provide whatever clarification [was] appropriate." [28] Those regulations—though conforming in other respects to the Title VI and Title IX procedures—prohibited all employment discrimination regardless of the purposes of federal financial assistance. See page 20, *supra*.

Section 505(a)(2) originated in the Senate, and the committee report on the bill, referring to that background, stated:

> It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures,

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[28] *Implementation of Section 504, Rehabilitation Act of 1973: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 73 (1977); see *id.* at 76.

> remedies, and rights under section 504 conform with those promulgated under title VI. Thus, this amendment codifies existing practice as a specific statutory requirement.

S. Rep. No. 95-890, *supra*, at 19. It is unlikely that, as petitioner argues (Br. 21), Congress simply "overlooked" HEW's coverage of all employment discrimination.[29] A more obvious explanation for the committee's statement is simply that the phrase "procedures, remedies, and rights" did not refer to substantive limitations like that in Section 604 of Title VI.

That Congress chose not to incorporate Section 604 into the Rehabilitation Act should hardly occasion surprise. After all, Title VII's employment remedies are available to supplement funds cutoffs under Title VI (see page 14, *supra*). But Title VII remedies are not generally available to handicapped employees. Moreover, the overriding purpose of the 1978 amendments was to expand, not contract, the rights of the handicapped. Thus, Section 505(a)(1) (29 U.S.C. (Supp. V) 794a(a)(1)) made Title VII remedies available to handicapped *federal* employees, who had theretofore had no private right of action. And Section 505(b) (29 U.S.C. (Supp. V) 794a (b)) for the first time allowed attorneys' fees to "assist handicapped individuals in securing the legal protection guaranteed them under title V of the [Rehabilitation A]ct." H.R. Rep. No. 95-1149, *supra*, at 21.[30] It is unlikely that Congress would have sandwiched between those two provisions a section whose unspoken purpose

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[29] When Congress disagreed with other provisions in the HEW regulations, it took steps to change them. See Comment, *supra*, 54 N.Y.U. L. Rev. at 1192 n.96.

[30] The amendments also added a new Title VI to the Rehabilitation Act to improve employment opportunities for handicapped individuals with poor employment prospects (29 U.S.C. (Supp. V) 795-795i), and a new Title VII to provide services and instruction to those lacking the potential for employment (29 U.S.C. (Supp. V) 796-796i).

was to eliminate a large part of the protection that Section 504 gave private employees. Rather, as the Senate report stated, Sections 505(a) and (b) were "designed *to enhance* the ability of handicapped individuals to assure compliance with the civil rights provisions of title V * * *." S. Rep. No. 95-890, *supra*, at 18 (emphasis added).[31]

III. THE CASE IS NOT MOOT, SINCE RESPONDENT MAY BE ENTITLED TO RECOVER BACK PAY

The original complaint in this action sought injunctive relief, back pay, punitive damages, and costs and attorney's fees (J.A. A7, A9). LeStrange having died, the claim for injunctive relief is moot (Pet. Br. 31). Contrary to petitioner's contention (*id.* at 40-47), however, respondent may be entitled to seek back pay for a violation of Section 504. The case itself is thus not moot. *Powell* v. *McCormack*, 395 U.S. 486, 496-500 (1969); *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 8-9 (1978).[32]

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[31] Those who considered the matter of employment coverage while the 1978 amendments were being debated uniformly assumed that it was not limited by the purpose of the federal assistance. See, *e.g.*, 124 Cong. Rec. 30346 (1978) (remarks of Sen. Cranston); 124 Cong. Rec. 30324 (1978) (remarks of Sen. Hathaway); *id.* at 30323 (remarks of Sen. Williams), 30577-30578 (remarks of Sen. Cranston); *Oversight Hearings on the Rehabilitation Act of 1973: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 95th Cong., 2d Sess. 501-503 (1978) (statement of Rep. Hyde). See also S. Rep. No. 96-316, *supra*, at 13; 44 Fed. Reg. 17174 (1979); 45 Fed. Reg. 37628 (1980).

[32] As we noted above, note 8, respondent's claim for back pay survives LeStrange's death.

The petition in this case did not present any question about the kinds of monetary relief available in private actions under Section 504. Pet. i. The Court thus need not decide the difficult question whether punitive damages, as well as back pay, may be awarded if respondent ultimately prevails. The availability of the latter kind of relief alone would resolve the question of mootness.

In the 1978 amendments to the Rehabilitation Act, Congress explicitly granted handicapped *federal* employees the right to collect back pay under Section 501 (29 U.S.C. 791). Regarding the new Section 505(a)(1) (29 U.S.C. (Supp. V) 794a(a)(1)) the Senate report said:

> [A]pplication of title VII will make available "back pay" as a remedy for a handicapped individual when he or she is the prevailing party. A recent Supreme Court decision provided that back pay will not be provided as a remedy by the Federal Government unless specifically allowed by Federal statute (*United States* v. *Testan*, 424 U.S. 392 (1976)).

S. Rep. No. 95-890, *supra*, at 19.

Of course no such "specific[]" authorization was required in the case of suits against private funds recipients. Section 505(a)(1) was thus simply designed to *equalize* the treatment accorded federal employees (under Section 501) and private employees (under Section 504). As the Senate Committee on Labor and Human Resources noted in 1979:

> It is, and has always been the Committee's intent that any handicapped individual aggrieved by a violation of title V has the right under existing law to proceed privately in federal court to enforce the rights and remedies afforded under title V of the Rehabilitation Act of 1973, as amended, and to receive back pay and attorney's fees if successful.

S. Rep. No. 96-316, *supra*, at 12-13.

In *Guardians Ass'n* v. *Civil Service Comm'n*, No. 81-431 (July 1, 1983), a majority of this Court suggested that compensatory relief such as back pay could be available to private plaintiffs invoking Title VI against intentionally discriminatory conduct. Slip op. 15 (opinion of White, J.); slip op. 10-20 (Marshall, J., dissenting); slip op. 2-5 (Stevens, J., dissenting). In *Guardians* Justice White found that no compensatory relief was available because there had been no proof of intentional dis-

crimination.[33] In such cases, he pointed out, imposition of monetary awards could simply encourage a recipient to "terminate its receipt of federal money rather than assume the unanticipated burdens" (slip op. 14). By contrast (slip op. 15; footnote omitted):

> [i]n cases where intentional discrimination has been shown, there can be no question as to what the recipient's obligation under the program was and no question that the recipient was aware of that obligation. In such situations, it may be that the victim of the intentional discrimination should be entitled to a compensatory award, as well as to prospective relief in the event the state continues with the program.

In this case the complaint alleged that petitioner "has maliciously, willfully and purposely discriminated against the plaintiff since 1973, solely because the plaintiff is handicapped. Despite the fact that the plaintiff has at all times been ready, willing and able to return to gainful employment with Conrail, the defendant has refused to rehire the plaintiff as an engineer" (J.A. A8-A9). Although respondent denied that allegation (*id.* at A11), the district court made no findings relevant to the issue, and the court of appeals did not address it. Thus even if the "intent" standard that governed the Title VI compensatory claims in the Court's decision in *Guardians* is (by virtue of Section 505(a)(2), 29 U.S.C. 794a(a)(2)) equally applicable to Section 504, it remains open in this case for respondent to prove her entitlement to such relief.

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[33] Slip op. 19-20. Justice Rehnquist joined this portion of Justice White's opinion. Justice Powell, joined by the Chief Justice, concurred in the judgment of affirmance because they believed that no private right of action was available under Title VI (slip op. 2-3). Alternatively, they, joined by Justice Rehnquist, would have held that no Title VI relief was available absent a showing of intentional discrimination (*id.* at 4-5). Justice O'Connor concurred in the judgment because the petitioners had failed to prove intentional discrimination (slip op. 1-4).

IV. WHETHER RESPONDENT'S CLAIM CONCERNS A "PROGRAM OR ACTIVITY RECEIVING FEDERAL FINANCIAL ASSISTANCE" IS AN ISSUE NOT PROPERLY PRESENTED TO THIS COURT

Petitioner argues (Br. 24-30) that the court of appeals failed to require a nexus between a specific federally assisted program and the denial of employment to respondent, thereby violating the "program-specific" nature of Section 504. In fact, the district court granted summary judgment without reaching this question, and the issue was therefore not before the court of appeals. Neither is it properly presented in this Court.

The evidence before the district court at the time petitioner moved for summary judgment showed that petitioner has received two kinds of federal financial assistance. First, the United States Railway Association ("USRA"), a government corporation established by the Regional Rail Reorganization Act of 1973, 45 U.S.C. (& Supp. V) 711 ("3R Act"), has purchased series A preferred stock and debentures from petitioner in the amount of $3.28 billion (J.A. A15-A17; 45 U.S.C. (& Supp. V) 726). These funds have been used in part to cover operating expenses not met by operating revenues (J.A. A15-A17; 45 U.S.C. 726(b)(1)(D)). Second, petitioner has received funds under Title V of the 3R Act (45 U.S.C. (& Supp. V) 771 *et seq.*), which provided certain benefits to railroad employees in order to protect them against the adverse consequences of consolidation.[34]

The district court granted petitioner's motion for summary judgment, holding simply that respondent lacked "standing" to sue under Section 504 (Pet. App. A46). That was so, the court concluded, because Section 504 does not forbid employment discrimination unless the primary purpose of the federal financial assistance was

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[34] Title V was repealed by the Northeast Rail Service Act of 1981 (Pub. L. No. 97-35, Title XI, Section 1144(a)(1), 95 Stat. 669), and was replaced by a new Title VII which affords protection to the same class of employees. 45 U.S.C. (Supp. V) 797 *et seq.*

to promote employment. Since, according to the district court, petitioner received no funding for that purpose (Pet. App. A37), respondent could not sue.[35] Having so decided, the court found it unnecessary to consider whether respondent had sought employment in a "program or activity" that received federal assistance.

The court of appeals did not hold that petitioner would be liable for discrimination even if it did not occur in a federally assisted program or activity.[36] Rather, the court disposed of the case in the same way this Court decided *North Haven*, *supra*, 456 U.S. at 539-540. The court simply held that Section 504 prohibited employment discrimination in federally assisted programs irrespective of the purpose of the federal assistance. It

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[35] The district court said that Section 504 also forbade employment discrimination if the harm done to one like petitioner caused discrimination against the primary beneficiaries of the federal aid (Pet. App. A33). That, however, did not happen here (*id.* at A45-A46).

The court's discussion of the employment coverage issue focused almost exclusively on the purpose of Title V. The only reference to the stock and debentures purchased by the USRA was an oblique statement that "the Act in general and Title VI in particular did not have a primary goal of providing employment" (*id.* at A37).

If the Court determines that Section 504 prohibits employment discrimination only where the federal financial assistance is intended primarily to provide employment, the case should be remanded for the court of appeals to review the district court's determination that the federal assistance received under Title V and through the USRA's purchase of stock and debentures was not primarily intended to provide employment. The court of appeals should also determine whether "providing employment" is limited, as the district court concluded (Pet. App. A35-A45), to providing new jobs, or whether it could include providing for the maintenance of existing jobs.

[36] It is true, as petitioner notes (Br. 26) that Judge Adams's concurrence relied in part on an earlier Third Circuit decision espousing an expansive view of the "program or activity" requirement of Title IX. Pet. App. A21-A22, citing *Grove City College* v. *Bell*, 687 F.2d 684 (3d Cir. 1982), cert. granted, No. 82-792 (Feb. 22, 1983). But neither Judge Bloch nor Judge Weis mentioned *Grove City* or discussed the "program or activity" question.

did not consider—nor did it have any factual basis for deciding—whether the discrimination alleged here had occurred in a federally assisted program or activity.

This Court, like the court of appeals, has no factual findings from the district court with which to address this question. It should therefore not decide it.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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